

# **EXHIBIT "G"**

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3 )  
4 RONALD L. OBREY, JR., ) CV 02-00033 MLR-LEK  
5 )  
6 Plaintiff, ) Honolulu, Hawaii  
7 vs. ) June 1, 2005  
8 ) 8:45 A.M.  
9 HANSFORD T. JOHNSON, etc., )  
10 ) Status Conference  
11 Defendant. ) Regarding Expert  
12 ) Witnesses  
13 \_\_\_\_\_ )

14  
15 TRANSCRIPT OF PROCEEDINGS  
16 BEFORE THE HONORABLE MANUEL L. REAL  
17 UNITED STATES DISTRICT JUDGE

18 APPEARANCES:

19 For the Plaintiff: CLAYTON C. IKEI, ESQ.  
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24 Proceedings recorded by machine shorthand, transcript  
25 produced with computer-aided transcription (CAT).

1 WEDNESDAY, JUNE 1, 2005 8:45 O'CLOCK A.M.

2 THE CLERK: Civil Number 02-00033 MLR, Ronald L.  
3 Obrey, Jr., versus Hansford T. Johnson, et al. This case  
4 is called for hearing Number 1: Status Conference  
5 Regarding Expert Witnesses.

6 CHAMBERS SECRETARY: Counsel, make your  
7 appearances, please.

8 MR. IKEI: Good morning. Clayton Ikei,  
9 representing Ron Obrey, plaintiff.

10 MR. CHING: Good morning, Your Honor. Assistant  
11 United States Attorneys Edric Ching and Thomas Helper,  
12 representing the defendant the Department of the Navy.

13 THE COURT: All right. We'll take up the  
14 plaintiff's motion to strike the expert offered by  
15 defendant. I'll hear you.

16 MR. IKEI: Yes, Your Honor. We submitted our  
17 motion on May 18th. May 17th we received a disclosure by  
18 the defendant's expert. We have nothing further to add to  
19 our motion and memo. Basically, Judge Gillmor's order  
20 dated April 24, 2003, ordered that -- and it was by  
21 stipulation and approved by Judge Gillmor -- that  
22 defendants had up to, and including, April 17 -- I'm  
23 sorry. June 17th, 2003, to file their expert disclosure,  
24 which they failed to do so and they did not do so until  
25 almost two years later after the remand had been ordered.

1 In fact, it was dated May 17, 2005. And, one, it violates  
2 the order of Judge Gillmor, and, more importantly, it  
3 violates Rule 16.

4 THE COURT: All right.

5 MR. HELPER: Your Honor, this is Tom Helper.  
6 I'm arguing this part of the motion or this motion for  
7 defendant. And, you know, I don't have a whole lot to add  
8 to our brief either. We raised this matter with the court  
9 in plaintiff's counsel's presence back in April when we  
10 were setting the trial date. We made clear our intention  
11 to get an expert witness, the court indicated that there  
12 was time enough to do that, plaintiff's counsel didn't  
13 object, and we provided the data as soon as -- or the  
14 report as soon as we got the complete disclosure from  
15 Mr. Ikei's expert, including all the electronic data. So  
16 I think we've acted diligently and promptly, gotten the  
17 court's permission, and it would be only fair to allow the  
18 jury to hear both sides of the statistical evidence --  
19 statistical case here.

20 MR. IKEI: Your Honor, I would object to Mr. --  
21 we cooperated with Mr. Helper, but at no time did we state  
22 that we would not raise the objection we are now raising.

23 MR. HELPER: No, that's true.

24 THE COURT: Just a moment. Didn't -- wasn't the  
25 discovery date extended?

1 MR. IKEI: Not that I'm aware of, Your Honor.  
2 Although, the discovery -- they have taken depositions but  
3 because Your Honor is in Los Angeles we felt it imprudent  
4 to file motions for protective order because I don't know  
5 who would hear it.

6 THE COURT: Well, I believe it's fair, if the  
7 plaintiff is going to offer statistical evidence, that the  
8 defendant should also be able to do that. And the fact  
9 that it was -- that the plaintiff's expert was excluded,  
10 certainly there would be no reason for the defendant on  
11 that basis to offer any statistical evidence in rebuttal.  
12 Now there appears to be, but we'll take up that just  
13 momentarily because -- and so the motion to exclude  
14 Mr. Skoog or Dr. Skoog, or whatever his name is, is  
15 denied.

16 But, Mr. Ikei, I do want to take up the question  
17 of the competency of Mr. Dannemiller to opine on the  
18 statistics since at least it appears that he didn't follow  
19 what statisticians usually follow in terms of making a  
20 determination of the makeup of the matters that are  
21 involved in this case; so his methodology under Dauber  
22 might be questionable. I'll hear you.

23 MR. IKEI: Well, we have discussed this matter  
24 with Mr. Dannemiller, and he did, in fact, follow the  
25 usual practices that are followed by statisticians. And

1 it is his conclusion that Mr. Skoog's opinion is  
2 misrepresenting and making conclusions -- assumptions,  
3 erroneous assumptions, about his methodology.  
4 Mr. Dannemiller, obviously, is not here to discuss  
5 procedures he used but would be able --.

6 THE COURT: -- his report that he's going to  
7 testify to. One of the things he's not going to testify  
8 to is his, quote, conclusion that as a result of his  
9 statistics that there was discrimination since he hasn't  
10 taken into account all of the matters that were doing  
11 that, and it's for the jury to make that determination as  
12 to whether or not there was discrimination based upon the  
13 statistics as they are presented to them --

14 MR. IKEI: But he --

15 THE COURT: -- not the conclusion of what the  
16 statistics show.

17 MR. IKEI: Your Honor, I think Your Honor is --  
18 I think that Your Honor -- the Ninth Circuit made it clear  
19 that Mr. Dannemiller's opinion and report is admissible  
20 and it is for the -- and any objections the defense may  
21 have go to the weight and not the admissibility.

22 THE COURT: They didn't say that his opinion  
23 that there was discrimination is admissible.

24 MR. IKEI: I believe they did, Your Honor.

25 THE COURT: No, I don't think so. There's

1 nothing in the opinion that indicates that.

2 MR. IKEI: They recite his opinion, and they say  
3 that that opinion is admissible.

4 THE COURT: On the statistics. But that's not a  
5 statistical matter. And it is for the jury to make the  
6 determination as to whether the statistics, which he is  
7 expert in, means discrimination. That's at least my  
8 understanding of the law.

9 MR. IKEI: I think he can state his opinion, and  
10 the jury is free to decide whether to accept that opinion.

11 THE COURT: No. I don't think -- it's for the  
12 jury to determine based upon the statistics. I don't  
13 think, quote, his opinion of discrimination is one which  
14 is admissible because it's a jury determination. He may  
15 give the statistics as he found them, and that's generally  
16 what statisticians do. They don't opine upon the question  
17 that's before the jury.

18 MR. IKEI: The court is saying, basically, that  
19 he may only give his statistics but he may not render what  
20 all experts are permitted to do, and that is to state  
21 their opinion as to what those statistics mean.

22 THE COURT: No. He's offered as a statistician.  
23 That means he's calculating the statistics. He's not  
24 offered as an expert on, quote, discrimination.

25 MR. IKEI: He is offered as an expert qualified

1 to give an opinion about discrimination, and that was the  
2 proffer that was made at the previous trial.

3 THE COURT: Well, he's not qualified -- you've  
4 given me no qualifications that he has to opine on, quote,  
5 discrimination. You offered him as a statistician --

6 MR. IKEI: The court is misreading our motion,  
7 Your Honor.

8 THE COURT: -- to give the statistics. Okay?  
9 That will be the ruling on at least Mr. Dannemiller.

10 MR. IKEI: May I state our objection because it  
11 seems to me that --

12 THE COURT: And Dr. Skoog will not be able to  
13 give an opinion either on the question of whether or not  
14 the statistics as he calculated them amounts to  
15 discrimination. All right?

16 Now, with reference to these three witnesses,  
17 that has still been left to me to make a determination.  
18 And I believe that the matter can be -- first of all, as  
19 they stand in your trial brief, Mr. Ikei, it does not  
20 represent what the circumstances were in each of those  
21 cases as to what the pool was, what their position was in  
22 terms of the pool, who the makeup of the ones who were  
23 making the recommendations, and the makeup of the rest of  
24 this. They were not -- they certainly were not -- the  
25 question was not -- were for very different jobs, as I



1 understand it, and the qualifications of the people who  
2 were involved in the matter; so they are mini trials,  
3 which will take too long to make those -- to make that  
4 determination.

5 I have suggested that the possibility would be  
6 that I would let you, if it's cleaned up so that there are  
7 no opinions and no problems with it and it is fully -- it  
8 is fully taken, that you rewrite what you call the  
9 evidence of other discriminatory promotions and that we  
10 read that to the jury as evidence of those -- of what they  
11 would testify to as an alternate to taking the time to try  
12 three cases -- three more cases.

13 MR. CHING: Your Honor, this is Assistant United  
14 States Attorney Edric Ching.

15 THE COURT: Yes.

16 MR. CHING: If we do go along with that option,  
17 the defendant requests that evidence of the administrative  
18 rulings against these three witnesses also be admitted --

19 THE COURT: Yes.

20 MR. CHING: -- and presented to the jury.

21 THE COURT: Yes.

22 MR. IKEI: Your Honor, I would -- it seems that  
23 Your Honor is not complying with the mandate of the Ninth  
24 Circuit, and we would ask leave of court to file a writ of  
25 mandamus because it is clear that nothing's changed as far

1 as Your Honor's --

2 THE COURT: No. We're going to trial because  
3 the opinion indicates very clearly that the district court  
4 will retain discretion to decide that the witness' claims  
5 so overwhelm the issues in the trial that their testimony  
6 must be excluded under Rule 403.

7 MR. IKEI: The sentence before that states the  
8 kind of considerations under 403 that is normally used to  
9 exclude does not apply in this case.

10 THE COURT: No. It doesn't say that. The  
11 sentence before that says, "On balance we believe that  
12 this proposed testimony was likely to be relevant, and  
13 Rule 403 considerations do not warrant exclusion in this  
14 case. Consequently, we find that the district court  
15 abused its discretion when it excluded the testimony. On  
16 remand the district court, of course, will retain  
17 discretion to decide that the witnesses' claims so  
18 overwhelm the issues in the trial that their testimony  
19 must be excluded under Rule 403."

20 MR. IKEI: But I don't believe that what Your  
21 Honor has in front of him would justify a finding that the  
22 testimony offered -- to be offered live by these witnesses  
23 would be so overwhelming that it would warrant an  
24 exclusion, as Your Honor has suggested.

25 THE COURT: Well, in each case you have to get

1 all of the evidence with reference to the pool, all of  
2 the -- it's exactly what Mr. Obrey would be presenting and  
3 what the defense would be presenting in Mr. Obrey's case.  
4 You have to go through that entire matter as to what was  
5 presented to the panel, who it was who was making the  
6 decision, all of these matters. That's three trials.

7 MR. IKEI: That is not three trials.

8 THE COURT: Well, it is three trials because for  
9 each one -- for each one we have to make the determination  
10 that there was, quote, discrimination.

11 MR. IKEI: It seems to me that Your Honor is  
12 engaging in trying to shortcut our presentation of the  
13 evidence, and I want to point out that in the Teamsters  
14 case that is the Supreme Court case, the Supreme Court  
15 noted that there were 49 anecdotal evidence presented, and  
16 we're only asking for three.

17 THE COURT: That case is nothing like this.  
18 Please. That case is nothing like this.

19 MR. IKEI: We believe it is not to the scope of  
20 it, but it is a like Teamsters case where we have alleged  
21 a pattern and practice, as has been made clear by the  
22 Ninth Circuit opinion and made clear that Your Honor  
23 abused the discretion in precluding us from offering  
24 evidence of a pattern and practice.

25 THE COURT: They left the discretion to me

1 still, Counsel. That is very clear. That is very clear,  
2 that language. So I have suggested to you how the matter  
3 can be avoided, and we can have an efficient trial.

4 MR. HELPER: Your Honor, Tom Helper. Just  
5 procedurally it is the court's expectation that Mr. Ikei  
6 would draft something, and we would try and work out some  
7 kind of agreement on a stipulation with --

8 THE COURT: Yes. Yes. As to how to present  
9 that evidence, the totality of the evidence.

10 MR. IKEI: And if there's disagreement, then the  
11 court will decide and --

12 THE COURT: That's right.

13 MR. IKEI: And I would suggest that this court  
14 is not totally unbiased in its rulings in terms of my  
15 client's ability to prove his entire case.

16 THE COURT: All right, Mr. Ikei. You have your  
17 own opinion, and I make the rulings. And that's the  
18 suggestion that I make to you because I feel that it would  
19 be three trials, which is too long, and I've suggested a  
20 way to obviate that problem and have an efficient trial  
21 here for Mr. Obrey and to allow him then to present that  
22 kind of evidence that he wants to present from these three  
23 people. And it will not take the question of questions  
24 and answers and cross-examination and questions and  
25 answers and cross-examination that will take four or five

1 days to try.

2 MR. IKEI: And I believe that Your Honor is more  
3 concerned with shortening this trial than giving my client  
4 a fair trial.

5 THE COURT: No, not at all. Not at all. I'm  
6 giving you an alternative to be able for you to present  
7 the evidence you want to present so that it will be  
8 efficient.

9 MR. IKEI: Well, for the record I disagree.

10 THE COURT: All right. Well, you rewrite these  
11 Mr. Kawachi and --

12 MR. IKEI: Your Honor, we have depositions  
13 scheduled for these three individuals.

14 THE COURT: What?

15 MR. IKEI: In light of this court's ruling,  
16 which I still object to, ask Your Honor issue an order  
17 that those three depositions not go forward because I  
18 don't see any need for us to waste our time.

19 THE COURT: No. If you make -- if you make just  
20 as you did in your trial memo and put in the matters which  
21 the government would cross-examine on or present in terms  
22 of how these were handled, then I think -- because you  
23 don't make a determination as to how it was handled, just  
24 that somebody -- they lost and somebody else was  
25 appointed.

1 MR. IKEI: But Your Honor is making --

2 THE COURT: The process is not -- that doesn't  
3 necessarily prove discrimination.

4 MR. IKEI: Your Honor is taking away from the  
5 jury the ability to decide whether these individuals lost  
6 on the basis of race or because of qualification.

7 THE COURT: No. I'm giving them the opportunity  
8 to do that. I'm giving them the opportunity to do that by  
9 this question as to how I've proposed to you as to how you  
10 could get it in evidence. Okay?

11 MR. IKEI: By the fact that Your Honor is going  
12 to make an ultimate ruling as to what we can present Your  
13 Honor is deciding for the jury what -- the question that  
14 they must answer. You're taking that away from them  
15 because --

16 THE COURT: No, I'm not taking it away from  
17 them. I'm giving you the opportunity to do that in that  
18 form so that it can be efficient for the jury to make a  
19 determination.

20 MR. IKEI: And how is the jury to make a  
21 determination when they can't decide on the credibility of  
22 witnesses who are not present in front of them?

23 THE COURT: Well, because that's the  
24 determination they have to make as to what that is. They  
25 can't make a different determination. They don't have to

1 make a determination of credibility. They have to make a  
2 determination of what's presented to them.

3 MR. IKEI: I believe the anecdotal evidence is  
4 clear that a jury is required as part of their function to  
5 make a determination as to credibility.

6 THE COURT: Mr. Ikei, I tell you how to do it.  
7 I've made you -- I've suggested to you the situation as to  
8 how that evidence can come in. Now -- and the opinion  
9 indicates that there could be some other way that the  
10 evidence could come in, and I'm suggesting that to you,  
11 according to the opinion of the Court of Appeals in Obrey  
12 versus the U.S. Navy. Okay?

13 MR. IKEI: And I would object because the jury  
14 is -- you're taking away the ability of the jury to make a  
15 determination on credibility.

16 THE COURT: Well, the jury gives -- the Court of  
17 Appeals gives me an opportunity to suggest to you how it  
18 could come in so that it will not take three trials --  
19 three full trials.

20 MR. IKEI: It will not take -- the offer that we  
21 will be making through these witnesses will not take --  
22 will not be three mini trials.

23 THE COURT: That offer is not sufficient because  
24 it doesn't tell the story. Okay?

25 MR. IKEI: I disagree. It tells the story. It

1 only tells --

2 THE COURT: Well, that's your opinion. I've  
3 read your trial brief, and it does not tell the story in  
4 that form. Okay? Now, if you want to give me a full  
5 offer of proof, then we'll look at that.

6 MR. IKEI: And Your Honor has indicated that the  
7 government has their opportunity to make a full offer and  
8 you will decide --

9 THE COURT: No. The offer will be together. It  
10 will be one statement of those cases.

11 MR. IKEI: But Your Honor will be the decider as  
12 to what is offered; therefore, Your Honor is deciding  
13 credibility.

14 THE COURT: Oh, no. I'm not -- no. I'm giving  
15 you the opportunity to give it to me to see whether or not  
16 it's relevant and it is something that should be and  
17 provides for the question that will not take undue time.  
18 That's what I'm deciding. I'm not deciding anything about  
19 what testimony's going to be. Your trial brief indicates  
20 that. But it doesn't fully cover it. That's all. I just  
21 want it fully covered.

22 MR. IKEI: Your Honor --

23 THE COURT: And maybe what we can do is we can  
24 have -- and you can fax to me and we can have a hearing on  
25 Friday as to the alternate possibility. Okay?



1 MR. CHING: Your Honor, this is Edric Ching.  
2 Are you proposing that Mr. Ikei submit a draft to us and  
3 we make comments on it and try to agree as much as  
4 possible as to the --

5 THE COURT: That would be one alternative. You  
6 could do it together on what happened to these people.

7 MR. IKEI: I don't think because of the  
8 contested matter that we could agree to an agreed  
9 statement of facts.

10 THE COURT: Well, you might be able to,  
11 Mr. Ikei. Try it. Just try it.

12 MR. CHING: Your Honor, this is Edric Ching. I  
13 will prepare on our side a statement of facts and fax it  
14 over to Mr. Ikei perhaps by noontime tomorrow?

15 THE COURT: And Friday we'll have a hearing.

16 MR. CHING: Okay.

17 THE COURT: Okay?

18 MR. CHING: Okay.

19 THE COURT: Same time.

20 MR. CHING: Okay. Your Honor?

21 THE COURT: Yes.

22 MR. CHING: Is this a good time to address other  
23 issues that going to happen at trial?

24 THE COURT: Certainly. Absolutely.

25 MR. CHING: Your Honor, one thing I would like

1 to request permission is for the Navy's representative to  
2 sit at our counsel table. He is retired Captain Jonathan  
3 Edwards from the Navy. I would like to ask permission for  
4 him to sit at counsel table at this time.

5 THE COURT: Any problem, Mr. Ikei?

6 MR. IKEI: Not with that. That was at the last  
7 trial.

8 THE COURT: All right.

9 MR. CHING: Another issue, Your Honor, is that  
10 during my opening statement I intend to use a form of  
11 PowerPoint and Sanction. And I would be happy to inform  
12 Mr. Ikei what we intend to put on the screen as long as  
13 he's going to do the same; he will extend us the same  
14 courtesy.

15 MR. IKEI: We've always done that with the  
16 government, Your Honor.

17 THE COURT: All right.

18 MR. CHING: And the other thing, Your Honor, is  
19 that --

20 THE COURT: But no argument. The opening  
21 statements are not arguments. It's not to argue the  
22 case.

23 MR. CHING: Yes.

24 THE COURT: Okay. All right. Go ahead.

25 MR. CHING: Your Honor, one of our other

1 witnesses his name is Robert Matsumoto. He had a stroke a  
2 couple years ago, and he is still undergoing speech  
3 therapy. So sometimes he takes a little bit longer to  
4 answer questions, and sometimes he gets a little tired  
5 when answering questions. So I would just ask the court's  
6 patience and indulgence with him. We may have to ask for  
7 maybe a little bit more frequent breaks with him because I  
8 think, when he goes about 20 minutes, half an hour, he  
9 does get tired.

10 THE COURT: He shouldn't have to take longer  
11 than that. All right.

12 MR. CHING: The other thing I want to point out,  
13 Your Honor -- we have discussed this with Mr. Ikei -- is  
14 we have a witness named Tetsu Omaye. He is a nuclear  
15 submarine senior management at the Pearl Harbor Naval  
16 Shipyard. They are currently undergoing a very important  
17 nuclear sub audit, and he is available on Wednesday  
18 morning. We have spoken to Mr. Ikei, and he has agreed  
19 that, if Mr. Ikei's case is still going on during  
20 Wednesday morning, that he would allow us to take Mr. Omai  
21 out of order. And we would like to ask the court's  
22 permission at this point for that.

23 THE COURT: All right.

24 Anything else?

25 MR. CHING: Your Honor, Edric Ching again. Your

1 Honor, Mr. Helper and I will be doing -- we are splitting  
2 the witness load, and, if you'd like, we will put it in  
3 writing prior to the trial as to which witnesses each of  
4 us will be handling.

5 THE COURT: All right.

6 MR. CHING: I think that's all, Your Honor.

7 THE COURT: All right. Then we'll see you on  
8 the 6th.

9 MR. IKEI: Your Honor, in light of this court's  
10 ruling to which we objected to, may I ask that this court  
11 order that the depositions scheduled for this morning not  
12 go forward.

13 MR. CHING: That's fine, Your Honor. This is  
14 Edric Ching. We're in agreement with Mr. Ikei as to that  
15 issue.

16 THE COURT: All right.

17 MR. CHING: That's without prejudice, Your  
18 Honor. If it -- later on we can't work something out, we  
19 reserve the right to take the depositions in the future.

20 THE COURT: That will be the order.

21 All right. Then we'll see you -- talk to you on  
22 Friday same time.

23 MR. IKEI: 8:45 A.M. Hawai'i time.

24 THE COURT: Yes. Thank you.

25 MR. IKEI: Thank you, Your Honor.

1 MR. CHING: Thank you, Your Honor.

2 (Court recessed at 9:15 A.M.)

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1 COURT REPORTER'S CERTIFICATE

2 I, Debra Kekuna Chun, Official Court Reporter,  
3 United States District Court, District of Hawaii, do  
4 hereby certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled  
6 matter.

7 DATED at Honolulu, Hawaii, June 1, 2005.

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DEBRA KEKUNA CHUN

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RPR, CRR

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